Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	
Declaratory Rule and Preemption of	)	WC Docket No. 04-245
State Action	)	
	)	

OPPOSITION OF THE PACE COALITION, COMPETITIVE CARRIERS OF THE SOUTH, TALK AMERICA, AND COMPTEL/ASCENT

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SUMMARY

The Tennessee Regulatory Authority ("TRA") and other state commissions have the authority to set rates for network elements that are made available under section 271 of the Communications Act of 1934, as amended (the "Act") through arbitration proceedings pursuant to the just and reasonable standard articulated by the Commission. BellSouth's entire petition is founded on an erroneous premise – that is, that states do not have such authority – and must be denied.

BellSouth is pursuing its challenge in the wrong forum. BellSouth is appealing a decision reached by the TRA in an arbitration proceeding. Specifically, BellSouth has requested that the Commission preempt a decision of the TRA that established, during an arbitration of an interconnection agreement between two parties – BellSouth and ITC^DeltaCom Communications, Inc. – a rate to be applied to local switching made available under section 271 of the Act. Pursuant to section 252(e)(6) of the Act, the exclusive remedy for challenging an *arbitration decision* is to appeal that decision to federal court. BellSouth has not done so, and the Commission should dismiss its petition.

The Commission also must dismiss BellSouth's petition on the merits. The Commission has not exerted exclusive jurisdiction over setting rates for network elements made available pursuant to section 271 of the Act, nor can it. Congress did not preclude the states from evaluating and establishing the terms of network elements made available to requesting carriers pursuant to section 271 of the Act. To the contrary, Congress explicitly required the Bell Operating Companies ("BOCs") to offer section 271 network elements pursuant to interconnection agreements (or Statements of Generally Available Terms and Conditions, where interconnection has not been sought). These interconnection agreements and SGATs must be

approved in accordance with section 252 of the Act. State commissions have the authority to resolve disputes involving interconnection agreements, because section 252(b)(1) permits either party to an interconnection agreement negotiation to "petition a State Commission to arbitrate any open issues." 47 U.S.C. § 252(b)(1). Open issues include the rates for all network elements, including network elements to be made available under section 271.

Furthermore, in articulating that the just and reasonable standard would apply to network elements made available under section 271, the Commission neither asserted exclusive jurisdiction over such network elements nor curtailed the states' ability to establish rates for such network elements. The Commission simply identified a standard of review that a state should apply when evaluating a BOC's rates for network elements made available under section 271.

Contrary to BellSouth's claims, allowing the states to arbitrate section 271 rates does not impede competition. There is an immediate need for state commissions to address ongoing prices for network elements affected by *USTA II*. CLECs have attempted to engage in good faith negotiations for months, only to encounter impediments – brought on solely by the BOCs – at every step of the negotiation process. The just and reasonable pricing standard is not a license to charge whatever rate the BOC wishes, and it is crucial that states are involved in the rate review process. There is no basis for granting BellSouth the relief it requests, and the Commission must deny BellSouth's petition.

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The Promoting Active Competition Everywhere ("PACE") Coalition, Competitive Carriers of the South, Talk America, and CompTel/ASCENT (collectively, "Joint Commenters"),[1] through their undersigned counsel, respectfully oppose BellSouth's Emergency Petition for Declaratory Rule and Preemption of State Action in the above-captioned proceeding. BellSouth's petition is founded on an erroneous premise and must be denied; the Tennessee Regulatory Authority ("TRA") and other state commissions have the authority to set rates for network elements made available under section 271 of the Communications Act of 1934, as

[1] The PACE Coalition is composed of competitive local exchange carriers ("CLECs") that provide a variety of telecommunications services to business and residential consumers throughout the country. Each PACE Coalition carrier and Talk America, also a CLEC, offers a form of bundled local exchange and long distance services, among other services, to residential and small business customers using the combination of network elements commonly referred to as the unbundled network element platform ("UNE-P"). CompSouth is a non-profit association committed to promoting customer choice in the provision of telecommunications services in the Southeast. CompSouth's members include regional and national CLECs as well as national industry associations. CompTel/ASCENT is a national industry trade association representing competitive telecommunications carriers and their suppliers. Its several hundred members include large nationwide suppliers as well as scores of smaller regional carriers.

amended (the "Act") through arbitration consistent with the just and reasonable standard set forth by the Federal Communications Commission ("FCC" or "Commission").

I. INTRODUCTION

Congress did not preclude states from evaluating and establishing the rates for network elements provided pursuant to section 271 of the Act. To the contrary, Congress explicitly required the Bell Operating Companies ("BOCs") to offer section 271 network elements pursuant to interconnection agreements (or, where interconnection has not been sought, pursuant to Statements of Generally Available Terms and Conditions ("SGATs")), approved in accordance with section 252 of the Act. And, as the U.S. Supreme Court has affirmed, it is the state commissions that establish specific rates in interconnection agreements where the parties are unable to agree.[2]

As explained below, the TRA conducted itself precisely as Congress intended. The parties to the ITC^DeltaCom/BellSouth arbitration first tried to resolve their disagreements through commercial negotiations and only sought arbitration when those negotiations reached an impasse, which is exactly the process adopted by Congress in the Act. The TRA then applied the 'just and reasonable' pricing standard that the Commission articulated in the *Triennial Review Order*[3] to the network element in question, based on the record evidence before it. BellSouth cannot show that the TRA acted improperly in setting the rate it adopted, in the standard it applied, or in the authority it exercised. In fact, BellSouth does not even dispute that the TRA

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2 *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, at 384 (1999) (stating "252(c)(2) entrusts the task of establishing rates to the state commissions . . . It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.").

3 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶ 656 (2003) ("*Triennial Review Order*").

established a just and reasonable rate. The Commission must deny BellSouth's request for preemption.

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ADDRESS BELLSOUTH'S PETITION TO PREEMPT THE TRA'S DECISION

As a threshold matter, BellSouth has chosen the wrong forum in which to bring its dispute. BellSouth is appealing a decision reached in a section 252 *arbitration proceeding*. Specifically, in its petition, BellSouth has requested that the Commission preempt a decision of the TRA that established, in the context of a section 252 arbitration of an interconnection agreement between BellSouth and ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), a rate for local circuit switching that BellSouth must provide to requesting carriers pursuant to section 271 of the Act.[4]

Pursuant to section 252(e)(6) of the Act, the *exclusive* remedy for an entity aggrieved by an arbitration decision is to file an appeal in federal court. Section 252(e)(6) explicitly states,

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.[5]

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[4] ITC^DeltaCom filed a petition for arbitration of an interconnection agreement pursuant to section 252 of the Act. One of the issues to be arbitrated was the rate at which BellSouth should provide local switching where it is not required to be provided as a network element under section 251 of the Act. After reviewing all of the evidence in the record and holding a hearing, on June 21, 2004, the TRA established an interim rate, subject to true-up, that BellSouth must charge ITC^DeltaCom for "switching outside of 251 requirements." The TRA has not yet released an order memorializing its decision.

[5] 47 U.S.C. § 252(e)(6).

Under the Act, the parties to an arbitration may seek relief from the Commission *only if* the state commission fails to act on an arbitration petition,[6] which is not the case here. Indeed, numerous courts have reiterated that federal courts have exclusive jurisdiction for challenges to state commission arbitration rulings. For example, in *MCI Telecommunications Corp v. Bell Atlantic-Pennsylvania*, the Third Circuit specifically addressed whether section 252(e) provides that a state commission's determination in approving an interconnection agreement would be subject to review in Federal Court.[7] The Court concluded not only that section 252(d)(6) "specifically provides for 'actions' in federal court to address 'agreements' and 'statements' approved by the state utility commissions," but also that "[f]ederal jurisdiction for the review of commission decisions on interconnection agreements is exclusive."[8] Accordingly, BellSouth should have appealed the TRA's decision to federal court, not the Commission, and the Commission, therefore, must dismiss BellSouth's petition due to lack of jurisdiction.

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6 *Id.* (stating "[i]n a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act.").

7 271 F.3d 491, 511 (3rd Cir. 2001). *See also GTE North v. Strand*, 209 F.3d 909 (6th Cir. 2000) ("Once a state commission rules on a proposed agreement, Section 252(e)(6), the FTA provision at issue in this case, authorizes any aggrieved party to 'bring an action in an appropriate Federal district court to determine whether the agreement...meets the requirements of section 251.'"); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company*, 222 F.3d 323, 337 (7th Cir. 2000) ("Subsection 252(e)(4) provides that '[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.' . . . This language indicates that Congress envisioned suits reviewing 'actions' by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.").

8 *Id.*

III. DISPUTES REGARDING THE PRICING OF NETWORK ELEMENTS ARE SUBJECT TO ARBITRATION BY THE STATES

BellSouth's petition is based on the fundamentally flawed claim that the Commission can – and has – exerted exclusive jurisdiction over the prices for network elements provided under section 271 for which there is no impairment finding under section 251 of the Act. Contrary to BellSouth's claim, the Act does not vest exclusive jurisdiction in the Commission to establish rates for these network elements. As discussed below, the states have the authority (and responsibility) through the section 252 arbitration process to effectuate compliance with the pricing standards applicable to section 271 network elements.

A. The Act Establishes that State Commissions Are Responsible for Arbitrating Disputes Regarding Network Elements

State commissions have authority under the Act to establish the rates that BOCs may charge for the provision of network elements provided pursuant to section 271 because the Act makes clear that disputes regarding such elements are subject to arbitration and the Act vests jurisdiction with the states – not the Commission – to arbitrate disputes involving interconnection agreements.[9]

BOCs must offer each network element listed on the section 271(c)(2)(B) competitive checklist either through interconnection agreements or SGATs. Section 271(c)(2)(A) states:

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[9] Contrary to BellSouth's claim, the TRA was not engaged in an enforcement action under section 271 when it arbitrated the dispute between ITC^DeltaCom and BellSouth. Although the parties conducted the commercial negotiations contemplated by the Act, they were unable to reach agreement on a number of issues, including the just and reasonable rate for local switching that all parties – including BellSouth – agree must be offered in order to comply with the section 271 competitive checklist. The TRA merely exercised its lawful authority in accordance with section 252 to arbitrate a dispute regarding an element that must be included in the parties' interconnection agreement in order for BellSouth to comply with section 271.

(A) AGREEMENT REQUIRED – A Bell operating company meets the requirements of this paragraph if, within the State for which authorization is sought –

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [interconnection Agreement], or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and

(ii) such access and interconnection meets the requirements of subparagraph (B) [the competitive checklist].

These interconnection agreements, in turn, are subject to the section 252 arbitration and review process. Section 271 unambiguously requires that the interconnection agreements that contain checklist items must be approved under section 252 of the Act.

§271(c)(1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[10]

The Act could not be clearer that section 271 network elements must be offered in interconnection agreements subject to the same review process as other (*i.e.*, section 251) network elements. By directly referencing section 271(c)(1)(A) and (B), Congress explicitly tied

[10] Section 271(c)(1)(A) (emphasis added).

compliance with the competitive checklist to the state commission review process described in section 252.

State commissions have the authority to decide what is contained in interconnection agreements, because section 252(b)(1) permits either party to an interconnection agreement negotiation to "petition a State Commission to arbitrate any open issues."[11] Open issues include the rates for all network elements, including elements required to be made available under section 271. The Commission has acknowledged the broad authority section 252 vests in the states. In the *Qwest Declaratory Ruling*,[12] the Commission cited the "substantial implementation role" afforded the states to conduct "the fact-intensive determinations that are necessary to implement contested interconnection agreements," highlighting that section 252(e)(5) permits preemption "only if [a] state commission fails to act to carry out its responsibility under section 252."[13]

The Commission already has addressed BOC attempts to evade the disclosure and review of rates, terms, and conditions contained in interconnection agreements. Specifically, in the *Qwest Declaratory Ruling*, the Commission rejected Qwest's view that section 271 network elements are not required to be included in interconnection agreements filed with the states.[14] The Commission concluded that section 252 creates a broad obligation to file agreements, subject to several narrow exceptions that do not exempt section 271 elements.[15] The Commission made clear that any agreement addressing ongoing obligations involving network

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11 47 U.S.C. § 252(b)(1).

12 *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19,337 (2002).

13 *Id.* at note 23.

14 *Id.* at 19,430.

15 *Id.*

elements – and the access and unbundling obligations of section 271 fall squarely within that definition – must be incorporated in interconnection agreements subject to the section 252 review process and, to the extent there is any question regarding those obligations, the state commissions are to decide the issue.[16]

The Commission's authority to review BOC applications for authority to provide in-region interLATA service under section 271 of the Act does not alter the states' arbitration authority. As discussed above, Congress delegated authority to the states to resolve any open issues arising in the context of interconnection agreements, including disputes regarding rates for network elements under section 271 of the Act. At the same time, Congress vested jurisdiction with the Commission to evaluate a BOC's application for in-region interLATA authority as well as to review complaints brought under section 271(d)(6) regarding a carrier's ongoing compliance with its obligations under section 271. Contrary to BellSouth's claims,[17] assigning authority to the Commission to evaluate a BOC's continuing compliance with section 271 in no way strips the states of their authority to review rates, terms, and conditions for network elements set forth in interconnection agreements.

Furthermore, there is no evidence of any Congressional intent to vest sole rate-setting authority with the Commission. As stated above, the language of the Act specifically provides that the states will have authority over the rates, terms, and conditions of items contained within interconnection agreements, which includes any network elements made available pursuant to section 271 of the Act. If Congress had wanted to vest sole jurisdiction with the Commission for setting rates for network elements made available under section 271, then it would have done so explicitly. In comparison, in defining jurisdictional authority for

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16 *Id.*

17 *See* BellSouth Petition at 6-7.

commercial mobile radio service ("CMRS") providers in section 309 of the Act, Congress delegated to the Commission the authority to evaluate the rates of CMRS providers, while providing authority to the states only to review the "other terms and conditions" of CMRS providers' service. Congress did not similarly establish a jurisdictional division in section 271 of the Act; Congress instead established a framework of concurrent jurisdiction between the FCC and the states.

B. The Commission Did Not Remove Authority from the States to Establish Rates by Making Section 271 Network Elements Subject to the 201/202 Pricing Standard

In the *Triennial Review Order*, the Commission articulated that the just, reasonable and nondiscriminatory pricing standard would apply to network elements made available pursuant to section 271 of the Act.[18] In doing so, the Commission neither asserted that it has exclusive jurisdiction over network elements made available under section 271 nor curtailed the states' ability (nor could it) to establish rates for these network elements. BellSouth's position that establishing a 201/202 pricing standard somehow divests the states of authority to review the propriety of the specific rates contained in interconnection agreements is untenable. The Commission simply set forth that the 201 and 202 pricing standard would apply to section 271 network elements – much like it did with regard to the TELRIC standard applicable to section 251 network elements – and left it to the states to determine whether prices for network elements made available pursuant to section 271 are consistent with that pricing standard.

In the *Triennial Review Order*, the Commission explained,

> [t]he pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing

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18 *See Triennial Review Order* ¶ 656.

> the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[19]

In the following paragraph of the *Triennial Review Order*, as BellSouth acknowledges in its petition,[20] the Commission again refers to the pricing methodology for section 271 network elements as a "pricing standard."[21] Specifically, the Commission states that the "appropriate inquiry for network elements required under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[22]

In setting forth the appropriate pricing standard, the Commission did not assume exclusive jurisdiction over the pricing for network elements made available under section 271; paragraph 663 of the *Triennial Review Order* is not a statement of jurisdiction. Rather, the paragraph simply identifies the standard of review that a state should apply in evaluating a BOC's rates for network elements provided under section 271. In fact, as illustrated above, the Commission emphasized that sections 201 and 202 of the Act apply to *interstate* – not intrastate communications. The Commission did *not* conclude that sections 201 and 202 in any way grant it exclusive jurisdiction over rates for network elements made available under section 271. As a practical matter, network elements are predominantly used to provide intrastate services; for example, intrastate usage commonly accounts for more than 90% of total usage of local circuit

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19 *Id.* ¶ 663.

20 *See* BellSouth Petition at 9 (citing *Triennial Review Order* ¶ 664).

21 *Triennial Review Order* ¶ 664.

22 *Id.*

switching. As a result, sections 201 and 202 almost never would govern rates if the traditional separation of regulatory jurisdiction applied.

By articulating that the just, reasonable and not unreasonably discriminatory pricing standard would apply, the Commission did not modify the division of pricing responsibility set forth in the Act. The 1996 Act preserved the traditional jurisdictional separation between interstate and intrastate services, with the Commission having primary responsibility for interstate services, while the states regulate intrastate services. The 1996 Act provides that the Commission may define, through rulemaking, a general rate setting methodology for network elements. In this instance, the Commission adopted a just and reasonable standard. It is the states' responsibility, however, to establish the actual rates – in accordance with that pricing standard – that will be charged by the BOCs. In *Iowa Utilities Board v. AT&T*, the Supreme Court affirmed this division of responsibility, stating that

> [section] 252(c)(2) entrusts the task of establishing rates to the state commissions...The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[23]

BellSouth has not cited any authority in support of its argument that a shift in the pricing standard from TELRIC to a section 201/202 just and reasonable pricing standard also merits a shift in the regulatory body tasked with applying that standard.[24] In support of its

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23 *Iowa Utilities Board v. AT&T*, 525 U.S. 366, 384 (1999).

24 BellSouth cites a laundry list of cases for the proposition that courts have held that claims based on sections 201(b) and 202(a) are within the Commission's jurisdiction. *See* BellSouth Petition at 10. BellSouth misses the mark. In the *Triennial Review Order*, the Commission merely articulated the pricing standard; it did not address authority to review rates adopted under that standard. Moreover, the cases that BellSouth cites are inapposite. For example, in *TotalTel v. AT&T*, the services at issue were interstate access services, provided under a federal access tariff. Accordingly, jurisdiction at the

position that states do not have the authority to set rates, BellSouth relies on the *Texas 271 Order* in which the Commission held that directory assistance and operator services were no longer required to be provided as UNEs, and thus were "not subject to the requirements of sections 251 and 252, including the requirement that rates be based on forward-looking economic costs."[25] In making this determination, the Commission noted that the TELRIC pricing standard no longer would apply to these network elements, and that these network elements instead would be subject to a section 201 and 202 pricing standard. At no time, however, did the Commission suggest that it was the sole entity to evaluate rates for these network elements.

BellSouth's reliance on *USTA II* in support of its position also is misplaced.[26] In *USTA II,* as BellSouth notes, the court found that the pricing standard applicable to section 251 network elements (*i.e.*, TELRIC) does not apply to section 271 network elements.[27] In making this finding, the court was addressing the appropriate pricing standard; the court was not discussing the role of either the Commission or the states in evaluating rates. The Commission must reject BellSouth's efforts to remove authority specifically delegated to the states.

IV. THE TRA ACTION DOES NOT QUALIFY FOR FEDERAL PREEMPTION

Although BellSouth has requested federal preemption of the TRA's action, it has carefully avoided citing the particular authority it believes the Commission should exercise in accomplishing that feat. For its part, the Act generally is deferential to state authority, preserving

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Commission (the entity charged with regulating interstate services) was appropriate. *See TotalTel v. AT&T*, 919 F.Supp. 472 (D.C. Cir. 1996), *aff'd,* 99 F.3d 448 (D.C. Cir. 1997). The situation in this case is distinct.

25 *SWBT Texas Order* ¶ 348.

26 *See* BellSouth Petition at 9-10.

27 *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 589 (D.C. Cir. 2004).

the states' ability to enforce their own access obligations and adhere to pro-competitive state laws. For example:

> § 251(d)(3) Preservation of State Access Regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that –
>
> (A) establishes access and interconnection obligation of local exchange carriers;
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> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

> §252(e)(3) Preservation of Authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State Commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

As the section above notes, the Act does contemplate, as described in section 253, federal preemption of a state commission under certain circumstances. The provisions of section 253 are specific, however, as to exactly what the Commission must find to justify its preemption. Specifically, section 253 of the Act permits the Commission to preempt a state if it determines, after notice and an opportunity for comment, that a state action violates one or the other of the following requirements.[28]

> (a) IN GENERAL - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

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28 47 U.S.C. § 253(a) & (b).

(b) STATE REGULATORY AUTHORITY- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Obviously, nothing in the TRA's ruling violates either of these provisions. Its determination of the just and reasonable rate (albeit on an interim basis) for local switching does not constitute a barrier to entry, nor did the TRA address any aspect of universal service. Consequently, the TRA's action fails to satisfy either prong of the preemption standard adopted by Congress in the 1996 Act and BellSouth's request must be denied.

V. ALLOWING THE STATES TO ARBITRATE SECTION 271 RATES DOES NOT IMPEDE COMPETITION

BellSouth's argument that permitting the states to arbitrate rates for section 271 network elements would impede competition is wholly without merit. Indeed, the reverse is true. There is an immediate need for state commissions to address ongoing prices for network elements affected by *USTA II*. In response to the Commission's call for negotiations, for months, CLECs have attempted to engage in good faith negotiations with BellSouth only to have their attempts stall at every step of the negotiation process. The CLECs have no bargaining power in these negotiations, such that the BOCs have no interest in engaging in the give-and-take characteristic of true commercial negotiations. The record is replete with evidence of the difficulty that CLECs have encountered throughout the negotiation process, and real world experience demonstrates that the notion that competition will flourish absent state intervention is preposterous.

The case before the TRA illustrates this problem. During negotiations with ITC^DeltaCom, BellSouth demanded recurring and non-recurring rates for local switching that

bore no relationship to costs, by any measure. BellSouth's proposed rate of $14.00 per port was 640% above the TELRIC rate established by the TRA, while its non-recurring rate of $41.50 for a simple migration was 4,000% above the corresponding cost-based rate.[29] The "record evidence" that BellSouth supplied in support of its unreasonable demand was laughable, as became apparent through the discovery process:

> BellSouth has been unable to locate anyone with knowledge or information of the process used to arrive at the "market rate" of $14.00.
>
> BellSouth has been unable to locate any workpapers or documents that may have existed or been used by the individuals who developed the $14.00 market rate.[30]

The just and reasonable pricing standard is not a license to charge whatever rate the BOC wishes, no matter how unreasonable or discriminatory. The TRA exercised its responsibility judiciously and in accordance with the Act.[31] There is no basis for BellSouth's request for relief.

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29 *See, e.g.,* BellSouth Response to ITC^DeltaCom's Petition for Arbitration, at Att. 2 (proposing local switching rates).

30 BellSouth Response to ITC^DeltaCom's 1st Interrogatories, Items 47 and 48 (emphasis supplied).

31 Importantly, nowhere in its petition does BellSouth allege that the interim local switching rate set by the TRA in the ITC^DeltaCom/BellSouth arbitration fails to comply with the just and reasonable pricing standard, nor could it.

VI. CONCLUSION

For the foregoing reasons, the Joint Commenters request that the Commission deny BellSouth's petition.

Respectfully submitted,

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July 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004 I served copies of the foregoing Opposition of the Pace Coalition, Competitive Carriers of the South, Talk America, and CompTel/ASCENT on the following by e-mail and U.S. mail, postage prepid:

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